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NTSB Order No. EA-3698

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of October, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. TIMOTHY J. BROWN, Respondent.	Docket SE-10685

OPINION AND ORDER

The respondent has appealed from the written initial decision issued by Administrative Law Judge William A. Pope, II, on May 29, 1990, following an evidentiary hearing held on May 16 and 17, 1990.[1] The law judge affirmed in part an order of the Administrator suspending respondent's commercial pilot certificate for 120 days on allegations that he violated sections 135.3, 135.293(a), 135.293(b), 135.343, 135.299, 135.33(b), and

[1]The written initial decision is attached.

91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135, by acting as pilot-in-command or second-in-command of passenger or cargo-carrying flights for compensation or hire, when he lacked the training and testing required by FAR Part 135, and on two occasions by operating such flights into Canada without operating specifications which authorized flights into Canada.[2] The law judge ruled that the Administrator had failed to establish that respondent served as a crewmember for 22 of the 25 flights alleged, but nonetheless affirmed the entire 120-day suspension ordered by the Administrator.

Respondent raises three issues on appeal.[3] First, he asserts, the law judge erred in affirming the allegation as to a July 13, 1987 flight because the Administrator alleged that respondent was the second-in-command of the flight, but the evidence established that he was the pilot-in-command and the law judge affirmed the allegation so as to conform to that evidence. As to the flights occurring on July 2 and 5, 1987 into Canada, as well as with regard to the July 13 flight, respondent claims that the law judge erred in finding that they had been conducted under FAR Part 135. Finally, respondent contends that the law judge erred by not reducing the sanction as a result of the Administrator's failure to prove respondent's involvement as a pilot with 22 of the 25 alleged flights. The Administrator urges

[2]The law judge has set forth the entire order as well as all of the pertinent FAR sections in his written initial decision, and they need not, therefore, be repeated here.

[3]The Administrator has filed a brief in reply.

the Board to affirm the law judge's initial decision in its entirety.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order as modified by the law judge, except as modified herein. For the reasons that follow, we will deny respondent's appeal.

The allegations against respondent arose during the Administrator's investigation into the operations of Air Maryland, Inc. ("AMI") and Buffalo Express Airlines, Inc. ("BEA") operated by David Broderdorf, whose certificates have been the subject of revocation orders previously affirmed by the Board. See Administrator v. Broderdorf, NTSB Order No. EA-3349, recon. denied, NTSB Order No. EA-3451 (1991), stay denied, NTSB Order No. EA-3499 (1992) and Administrator v. Air Maryland, Inc., NTSB Order No. EA-2951 (1989). During the investigation of AMI, respondent's name was discovered listed on load manifests as the second-in-command of numerous Part 135 flights operated out of Buffalo.[4] Respondent does not dispute that he was physically present on these flights, which he concedes were Part 135 flights.[5] He denies, however, that he served as a crewmember on

[4]The question of whether the flights which are the subject of the complaint were operated by BEA or AMI is irrelevant to the Board's decision here. Accordingly, this opinion should not be construed as determinative of that issue.

[5]Respondent stipulates that the majority of flights were operated for compensation under the provisions of Part 135, and

any Part 135 flights.

According to respondent, he came to Buffalo in 1987 from Canada, looking for work as a pilot. He approached David Broderdorf at BEA, who referred him to Robert Cadwalader at AMI. Respondent testified that Cadwalader told him he needed more IFR experience before he could allow him to fly for the Part 135 operation. Cadwalader told respondent that he would allow him to ride along on charters for car dealers operated out of Buffalo, so that respondent could "observe" how these operations were conducted. According to respondent, Cadwalader also agreed that respondent could fly Part 91 legs such as return trips without passengers. Notwithstanding evidence that respondent logged these hours in his pilot's logbook under the category "second pilot/student/passenger," the law judge ruled that the evidence was insufficient to prove respondent actually performed second-in-command duties on these Part 135 flights.[6] He sustained the allegations only as to three flights occurring on July 2, 5, and 13, 1987.

We turn first to the round-trip flights between Sudbury, Canada and Buffalo on July 2 and 5, 1987, which respondent admits he operated[7] as pilot-in-command. Respondent testified that he

(..continued)
that he lacked the necessary Part 135 training at the time of their operation. See Initial Decision at 5.

[6]The Administrator has not appealed these findings.

[7]Respondent contends that he cannot be the "operator" of the flights because the Board has already determined that BEA "operated" these flights. Administrator v. Air Maryland, Inc., NTSB Order No. EA-2951. This contention is without merit. The

was present (as an "observer") on a Part 135 flight in June when one of the passengers asked Broderdorf if the carrier could arrange a flight to Sudbury for a fishing trip over the Fourth of July weekend. Respondent claims that he heard Broderdorf reply to the passenger that the carrier was not authorized to fly to Canada. Sometime later, respondent testified that the passenger, who knew of respondent's interest in attending to personal business in Sudbury, contacted respondent and asked him if he could pilot the aircraft, which the passenger would "borrow" from the owner, who was also a "friend." Respondent claims he discussed with Broderdorf whether the flight to Canada would be under Part 135, and Broderdorf told him it was under Part 91 because the passengers had arranged for the use of the aircraft through the owner. Respondent denies knowing that the flights were subsequently billed to BEA's regular customer, Northtown Subaru.

Respondent asserts that the Administrator failed to establish by a preponderance of the evidence that these flights were operated under FAR Part 135. We disagree. The Administrator produced load manifests showing that the flights were coded as charter operations, as well as invoices from BEA to Northtown Subaru, its regular customer for Part 135 operations, billing for the round-trip. Respondent admits he dropped his

(..continued)
finding that BEA operated the flights as the carrier does not preclude a finding that respondent operated the flights as pilot-in-command. The term "operate" means "...use, cause to use or authorize to use aircraft for the purpose...of air navigation including the piloting of aircraft...." FAR §1.1.

passengers off in Sudbury, returned the aircraft to its home base in Buffalo, and then returned to Canada three days later to retrieve the passengers.[8] We agree with the law judge that this evidence refutes respondent's claim that he agreed to fly the aircraft to Sudbury for personal business, notwithstanding respondent's submission of a credit card charge for fuel which he claims proves that he shared in the expense of the flight.[9] Respondent's assertion that it was incumbent on the Administrator to disprove his claim that this was a shared expense flight under Part 91 is erroneous.[10] The burden to establish that these were Part 91 flights shifted to respondent once the Administrator produced some evidence that they were Part 135 flights. See Administrator v. Bowen, NTSB Order No. EA-3351 at 14-15 (1991)(inference raised by Administrator's evidence of Part 135 status of flights rebutted by respondent's evidence that the flights were operated under Part 91); Administrator v. Woolsey, NTSB Order No. EA-3391 (1991)(Administrator produced prima facie

[8]Respondent was unable to explain how he knew he was to return three days later, claiming that the passengers gave him no instructions on when and where to pick them up. The law judge expressed his disbelief that the owner of the aircraft would permit his aircraft to remain in the possession and be available for the unrestricted use of a pilot he did not know.

[9]Nor is the fact that a Customs official indicated on a customs form that the purpose of the flight was for "pleasure" rather than for "business" dispositive of the issue, as respondent argues.

[10]At the time of the allegations FAR §91.501 contained exceptions to Part 135 allowing, under certain circumstances, aircraft to be leased with flight crew to another person where no charge is made, other than for expenses of the flight.

evidence that subject flights were operated under Part 135 which was not rebutted by respondent).

In the Board's view, the only question before us is whether respondent knew or should have known that these were actually Part 135 flights. Administrator v. Mardirosian, NTSB Order No. EA-3216 at 7 (1990); Administrator v. Fulop, NTSB Order No. EA-2730 at 14 (1988). We concur in the law judge's analysis of this issue, which he deemed to be one of credibility, and we agree with his conclusion that respondent was simply not credible and he "...well knew that the Canadian flights were Air Maryland charter flights."[11] Initial Decision at 13. We adopt the law judge's findings as our own.

Turning to the July 13, 1987 flight, the Administrator's complaint alleged that respondent served as second-in-command of this flight. The Administrator produced a load manifest which shows that two passengers were transported to Detroit on July 13, 1987 with Drew Machamer serving as pilot-in-command and respondent listed as second-in-command. The first leg of the trip, from Buffalo to Detroit, is coded as "2," which meant it was a charter flight. (TR-37). The next three legs are uncoded. According to a letter respondent wrote to the FAA (Administrator's Exhibit S), after the two passengers deplaned in Detroit, Machamer flew the aircraft to Willow Run, where he had personal business. Machamer remained in Willow Run and respondent returned to Detroit with the aircraft. Respondent

[11]See note 4, supra.

retrieved the same two passengers, and transported them back to Buffalo.

Respondent claims that Machamer told him that the flight was operated under Part 91. Even assuming, arguendo, that Machamer told[12] respondent that the flight or any part thereof would be operated under Part 91, we find that such reliance would have been unreasonable. Respondent knew at all times that BEA-AMI[13] was a Part 135 operator, and he concedes that most of the flights were operated under Part 135. Respondent offers no explanation of why it would be reasonable for him to believe that a flight operated by a Part 135 operator to Detroit with passengers was a Part 91 flight, and his suggestion that the status of the flight was determined by, or altered on the return leg because of, the pilot-in-command's departure to conduct personal business in Willow Run is, as the law judge found, not worthy of belief. See Administrator v. Hagerty, NTSB Order No. EA-3549 (1992). We agree with the law judge that there is sufficient evidence to support the conclusion that the July 13 flight was conducted under Part 135.

Respondent further asserts that, notwithstanding his admission that he was the pilot-in-command of the return flight on July 13, 1987, and even if it was operated under Part 135, the findings that he violated FAR sections 135.5, 135.293(a),

[12]Machamer died in an aircraft accident which precipitated the investigation into AMI's operations.

[13]See note 4, supra.

135.293(b), 135.343, 135.299, and 91.9 should not be sustained on due process grounds, because he was charged with being the second-in-command of the flight, and not the pilot-in-command. We disagree. The gist of the Administrator's complaint was that respondent manipulated the controls of an aircraft which was being operated under FAR Part 135, when he was not qualified to do so. His status as either the pilot-in-command or second-in-command is irrelevant to the finding that his actions resulted in violations of the alleged FAR sections. Moreover, respondent's vague claims of prejudice in his defense because of his lack of notice of the Administrator's allegation that he was the pilot-in-command on July 13 are insufficient to warrant dismissal of the charges.[14]

Finally, we turn to the issue of sanction. Respondent asserts, without supporting argument, that the law judge, having reversed the Administrator's order on 22 of 25 of the allegations, should have reduced the sanction. While Board precedent is clear that the dismissal of allegations contained in the Administrator's complaint may serve as a compelling reason to reduce the sanction ordered by the Administrator, we are unaware of any precedent which mandates a reduction where the sanction sought would still be appropriate for the charges sustained. In

[14]We will set aside the finding of a violation of FAR §135.299, which specifically applies to an operator or a pilot-in-command, unlike the other allegations that apply to any pilot manipulating the controls of the aircraft. See Oceanair of Florida v. Nat. Trans. Safety Bd., 888 F. 2d 767, 770 (11th Cir. 1989)(holding that amendment of revocation order adding new charges without notice and opportunity to be heard improper).

any event, the law judge did evaluate the appropriateness of the sanction in light of his dismissal of 22 of the charges, and he determined that because of respondent's intentional[15] violation of FAR Part 135 on three occasions, a 120-day suspension was nonetheless warranted. Respondent has failed to cite any legal precedent in support of a reduction in sanction, and our review of Board precedent involving similar infractions leads us to the conclusion that 120 days is not inconsistent with precedent or otherwise inordinate, in light of respondent's breach of the high standard of care expected of those who act as pilots in commercial operations.[16]

[15]The law judge explained that he found respondent's denials to be unbelievable. Initial Decision at 16. We construe his statement to mean that he believed that respondent intentionally manipulated the controls of an aircraft being operated under Part 135, with paying passengers on board, when he knew he was not qualified to do so.

[16]Sanctions ordered by the Administrator range from 15 days, Administrator v. Mardirosian, supra, to 90 days for one flight, Administrator v. Poirer, 5 NTSB 1928 (1987), to revocation for three flights (where the pilot had knowledge that the operator had no operating certificate), Administrator v. Muscatine and Anderson, 5 NTSB 2132 (1987).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as modified by the law judge's initial decision, and the initial decision, except with regard to the finding of a violation of FAR section 135.299, are affirmed; and

3. The 120-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.[17]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[17]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).